

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZOOM ELECTRIC, INC., a California
corporation,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595, a
labor organization, and DOES
1-20,

Respondents.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595, a
labor organization,

Counter-Plaintiff,

v.

ZOOM ELECTRIC, INC., a California
corporation; VEIKO HORAK,
individually and as the alter-ego
of ZOOM ELECTRIC, a sole
proprietorship; and DOES ONE
through TEN, inclusive,

Counter-Defendants.

No. C 11-1699 CW

ORDER DENYING ZOOM
ELECTRIC AND
HORAK'S MOTION TO
DISMISS, Docket
No. 17, DENYING
ZEI'S MOTION TO
VACATE, Docket No.
20, DENYING HORAK
AND ZEI'S MOTION
TO DISMISS, Docket
No. 60, GRANTING
THE UNION'S MOTION
FOR LEAVE TO FILE
A SECOND AMENDED
COUNTER-COMPLAINT,
Docket No. 62, AND
GRANTING THE
UNION'S MOTION TO
CONFIRM AND
ENFORCE AND FOR
PARTIAL SUMMARY
JUDGMENT, Docket
No. 69

Petitioners and Counter-Defendants Zoom Electric, Inc. (ZEI)
and Vieko Horak seek dismissal of the counter-claims of Respondent
and Counter-claimant International Brotherhood of Electrical
Workers, Local 595 (the Union) and to vacate an arbitration award
against it and in favor of the Union. The Union opposes these
motions, seeks to confirm and enforce the arbitration award, and
moves for summary judgment on its counter-claim against ZEI and

Horak for failure to make benefit contributions pursuant to 29 U.S.C. §§ 301, 1132 and 1145. The Union also requests leave to file a second amended counter-complaint. ZEI and Horak oppose all of the Union's motions. Having considered the papers filed by the parties and their oral arguments, the Court DENIES ZEI and Horak's motions and GRANTS the Union's motions.

BACKGROUND

The parties do not dispute the material facts, which are set forth below.

ZEI's corporate status was suspended at all times relevant, until it was revived on July 11, 2011. Horak Decl. ¶ 2, Ex. A; IBEW's First Request for Judicial Notice (1RJN), Docket No. 27, Ex. D. At all times relevant, Vieko Horak was ZEI's sole owner and its agent for service of process, and his address was the same as ZEI's address. Id. Since June 29, 2005, Horak has also been registered to do business under the fictitious business name "Zoom Electric" in the City and County of San Francisco. 1RJN, Ex. E.

The Union is a party to a Project Labor Agreement (PLA), which governs the wages and hours, and terms and conditions of employment, for construction work at the Oakland Unified School District (OUSD). Maloon Decl. ¶ 3, Ex. A (PLA). On or about September 8, 2010, Horak signed a Letter of Assent on behalf of ZEI, agreeing to be bound by the terms of the PLA while performing work on OUSD construction projects. Martin Decl. ¶ 3; Maloon Decl. ¶ 9, Ex. C. Horak listed ZEI's California contractor license number as C10 857743 on the Letter of Assent. Maloon Decl. ¶ 9, Ex. C. This number was not ZEI's but was Horak's individual contractor license number, which was registered for him

1 to do business as "Zoom Electric." Horak Decl. ¶ 3; 1RJN, Exs. A,
2 B; Maloon Decl. ¶ 19. More than a year later, on September 12,
3 2011, ZEI applied for its own contractor license; the State
4 rejected its application on September 19, 2011. IBEW's Second
5 Request for Judicial Notice (2RJN), Ex. A.

6 The PLA sets forth certain requirements with which
7 contractors must comply to hire workers for covered projects,
8 including that contractors must hire Union members who are out of
9 work, in a one-to-one ratio with the contractor's own employees;
10 hiring of either must take place through a referral from the
11 Union. PLA ¶ 8.1. According to this system, the contractor must
12 first hire a Union worker, then may hire the contractor's own
13 qualified worker through a referral from the Union, then may hire
14 a second Union worker, then a second of the contractor's workers,
15 and so on, until the contractor has a sufficient crew for the job
16 or he has hired ten of his own workers. Id. To be referred to
17 the contractor, the contractor's employees must first apply to the
18 Union to work on the project and must meet certain qualifications.
19 Id. The PLA excludes from this requirement "a Contractor's
20 executives, managerial employees, engineering employees,
21 supervisors" Id. ¶ 2.7.

22 All contractors who are signatories to the PLA are obliged to
23 provide conditions of employment, and wages and benefits at
24 certain specified rates, in accordance with the PLA. Id. at
25 ¶¶ 9.3-9.4. Contractors also agree to "pay contributions to the
26 established vacation, pension or other form of deferred
27 compensation plan, apprenticeship, and health benefit funds for
28 each hour worked on the Project" in certain specified amounts.

1 Id. at ¶ 9.1. The amounts are set forth in Schedule A, which
2 consists of the Alameda County Inside Construction Agreement, and
3 which establishes eight employee benefit trust funds. Id. at
4 ¶ 9.2; Maloon Decl. ¶ 7, Ex. B.

5 The PLA further provides that it is "the responsibility of
6 the Contractor(s) and Unions to investigate and monitor compliance
7 with the provisions of the agreement" described above. PLA Art.
8 X. The PLA specifically states, "Nothing in this agreement shall
9 be construed to interfere with or supersede the usual and
10 customary legal remedies available to the Unions and/or employee
11 benefit Trust Funds to collect delinquent Trust Fund contributions
12 from Contractors on the Project." Id.

13 The PLA also establishes a "grievance arbitration procedure."
14 See id. at Art. XII. Under the procedure, if parties are unable
15 to resolve a dispute arising "out of the meaning, interpretation
16 or application of the provisions of this Agreement, including the
17 Schedule A agreements" by meeting and conferring about the dispute
18 (Step 1), they are required to submit the dispute to the Joint
19 Administrative Committee (JAC), which must meet "to confer in an
20 attempt to resolve the grievance" (Step 2). Id. at ¶¶ 12.1, 12.2.
21 If the dispute is not resolved within the time allowed for
22 resolution by the JAC, either party may refer the dispute to an
23 arbitrator within five days (Step 3). Id. at ¶ 12.2. The
24 arbitrator must conduct a hearing on the dispute and give the
25 parties a binding decision within five days after the hearing.
26 Id. The PLA specifies that the "Arbitrator shall have no
27 authority to change, amend, add to or detract from any of the
28 provisions of the Agreement." Id.

On October 14, 2010, three ZEI employees began electrical work on a fire alarm replacement project at Roosevelt Middle School in the OUSD.¹ Martin Decl. ¶¶ 2, 4; Maloon Decl. ¶ 11. These included: Horak, owner and Chief Executive Officer of ZEI; Aleh Holdvekht, project manager; and Valentin Penkin, electrical wiring supervisor. Martin Decl. ¶ 4.

On December 20, 2010, a Union representative, Matt Maloon, visited Roosevelt Middle School and observed Holdvekht and Penkin working without any accompanying Union workers. Martin Decl. ¶ 4; Maloon Decl. ¶ 11. The Union subsequently began the grievance procedures contained in the PLA for ZEI's work in October through December 2010. Martin Decl. ¶¶ 5-6; Maloon Decl. ¶ 12. The Union's grievance alleged that, during this period, ZEI failed to comply with the PLA's referral process and that ZEI failed to make contributions to the trust funds on behalf of the employees who had worked on the project. Maloon Decl. ¶ 12, Ex. D. The Union demanded payment for the wages that should have gone to Union workers and for employee benefit contributions for all hours worked on the project. Id.

On or about January 24, 2011, ZEI ordered labor from the Union and journeyman electricians Wilberto Cuellar-Arandia and

¹ Throughout the events relevant to the Roosevelt Middle School project and subsequent JAC proceedings, Horak used both the names Zoom Electric and Zoom Electric, Inc. indiscriminately. See, e.g., Thomas Decl. ¶ 6, Ex. F (documents created or signed by Horak for the Roosevelt Middle School job listing both Zoom Electric and Zoom Electric, Inc.). Because the Court finds that Horak would be individually liable for the judgments against either entity, the Court need not resolve which entity took which particular actions. The Court will use ZEI to refer to both, unless otherwise specified.

1 Douglas R. Lindsey were dispatched to the Roosevelt Middle School
2 fire alarm replacement job. Maloon Decl. ¶ 14.

3 The JAC held a hearing on January 31, 2011 on the Union's
4 grievance about the October through December 2010 violations and
5 subsequently accepted written briefs from the parties. Maloon
6 Decl. ¶ 15. ZEI did not dispute that it had violated the PLA and
7 disputed only the amount of money for which it should be liable.
8 Maloon Decl. ¶ 17, Ex. G. ZEI argued that its employees were
9 exempt from coverage by the PLA, because they performed managerial
10 work. Id. ZEI also contended that the Union was seeking to
11 recover "double benefits" contributions to the trust funds instead
12 of the amount that the trust funds would have received had ZEI
13 complied with the PLA, because the Union sought one award for the
14 benefits contribution and a second award for wages, which also
15 included a benefits contribution. Id. Finally, ZEI argued that
16 it should be penalized only for the number of hours that Union
17 workers would have worked had ZEI complied with the referral
18 process. Id.

19 On or about February 18, 2011, B-side, Inc., the general
20 contractor on the Roosevelt Middle School project, and ZEI
21 submitted to the trust funds reports of hours worked under the PLA
22 in the form of ZEI records for the month of January 2011. Maloon
23 Decl. ¶ 16, Ex. E. The reports stated that ZEI owed \$1,961.88 in
24 fringe benefit contributions on behalf of Cuellar-Arandia and
25 Lindsey for thirty-two hours of work each. Id.; Horak Depo., Ex.
26 35. On or about February 20, 2011, the Union received a timely
27 check from ZEI in the amount of \$1,961.88, which the Union
28 forwarded to the trust funds. Maloon Decl. ¶16, Ex. F; Horak

1 Depo., Ex. 36. In addition to the thirty-two hours reported,
2 Cuellar-Arandia and Lindsay each worked eight hours for ZEI during
3 the month of January, which ZEI did not report and for which ZEI
4 did not make fringe benefit contributions. Horak Depo., Ex.
5 37-38. ZEI's employee, Penkin, also worked thirty-two hours on
6 the project in January 2011, which ZEI did not report and for
7 which ZEI did not make fringe benefit contributions, though
8 payment of these contributions was required by the PLA. Id.

9 The JAC issued a decision on February 22, 2011. Maloon Decl.
10 ¶ 17, Ex. G. The JAC stated in relevant part,

11 The JAC considered both the position of the UNION and
12 the EMPLOYER with regard to the payment of Trust Fund
13 benefits on behalf of workers of Zoom Electric, Inc.
14 that worked[] hours in violation of the PLA. The
15 EMPLOYER states that the payment of hours represents a
16 payment of "double benefits" to the UNION. In fact,
17 after review of Article IX, Wages, Benefits And Working
18 Conditions, it is clear to the JAC that the benefit
19 payments [do] not go to the benefit of the Union, but
20 rather, specifically they go to the benefit of workers
21 who are entitled to the accrued benefits of such
22 contributions. For the JAC to not acknowledge that fact
23 would contribute to further victimization of those
24 workers.

25 The JAC also considered the position taken by the
26 EMPLOYER which would only penalize a violating
27 contractor for hours in the proper ratio as required by
28 Article VIII, Referral. . . . To accept this premise
would be to accept a significant flaw with regard to
enforcement of the PLA. Employers that violated the PLA
with regard to proper dispatch would only be held to
account, as if they had properly dispatched and had not
violated the PLA. That would only create an enticement
to violate the PLA . . .

Id. at 5-6. The JAC rejected ZEI's argument that some of the
hours worked should have been considered exempt by the PLA as
managerial work, relying on ZEI's certified payroll records which
indicated hours covered by the PLA and which were signed under
penalty of perjury by Horak. Id. at 6.

1 The JAC ordered ZEI to pay as follows:

2 Payment to workers on the IBEW 595 Available for Work
list of 1648 hours totaling \$116,299.36

3 Payment on behalf of employees of Zoom Electric, Inc. to
4 the IBEW, 595 Trust Funds totaling \$42,963.36 for hours
worked in violation of the PLA.

5 Id.

6 ZEI continued to employ Union labor until sometime in March
7 2011. Maloon Decl. ¶ 18. Neither ZEI nor B-side, Inc. reported
8 hours worked by these individuals to the trust funds or paid the
9 fringe benefit contributions owed on account of the hours worked.

10 Id. During February 2011, Cuellar-Arnadia and Lindsey worked
11 sixteen hours each and Penkin worked thirty-two hours. Horak
12 Depo., Exs. 37-38.

13 On April 6, 2011, ZEI filed the instant action seeking to
14 vacate the JAC award, and subsequently amended its pleadings on
15 April 29, 2011. Docket Nos. 1, 11.

16 On May 6, 2011, the Union answered ZEI's amended pleading and
17 filed a counter-complaint for confirmation and enforcement of the
18 JAC award against both ZEI and Horak. Docket Nos. 15, 16.

19 On June 27, 2011, Horak and Zoom Electric, as a sole
20 proprietorship, filed a motion pursuant to Federal Rule of Civil
21 Procedure 12(b)(1) and (6) to dismiss the Union's counter-claims.
22 Docket No. 17. On June 29, 2011, ZEI filed a motion to vacate the
23 JAC award, seeking an order that the parties proceed to Step 3 of
24 the PLA's grievance arbitration procedure. Docket No. 20.

25 On October 20, 2011, the Court granted the Union's motion for
26 leave to file a first amended counter-complaint, adding a cause of
27 action against ZEI and Horak alleging that they had failed to make
28

1 benefit contributions for work performed under the PLA for January
2 through March 2011. Docket No. 54.

3 On November 8, 2011, ZEI and Horak filed a motion to dismiss
4 the Union's cause of action related to January through March 2011,
5 arguing that the Union had failed to exhaust administrative
6 remedies in relation to that charge. Docket No. 60. On that same
7 day, the Court set a briefing and hearing schedule as to the
8 previously filed dispositive motions. Docket No. 62.

9 On November 30, 2011, the Union filed a motion for leave to
10 file a second amended counter-complaint. Docket No. 62. The
11 Union seeks to add B-Side, Inc. as a Counter-Defendant, to hold it
12 liable for both claims as the general contractor to subcontractor
13 ZEI pursuant to California Labor Code § 2750.5. The Union also
14 seeks to add as Counter-Plaintiffs the trust funds themselves,
15 Alameda County Electrical Industry Service Corporation (EISC),
16 which serves as the collection agent for the trust funds, and
17 Victor Uno and Don Campbell, who serve as trustees for the trust
18 funds and officers of EISC.

19 On December 8, 2011, the Union filed a consolidated
20 opposition to ZEI and Horak's pending motions, a cross-motion for
21 confirmation and enforcement of the JAC award and a motion for
22 summary judgment against ZEI and Horak on its counter-claim
23 related to benefit contributions in January and February 2011.
24 Docket No. 69.

DISCUSSION

I. Cross-motions to vacate or to confirm and enforce the arbitration award against ZEI

In its consolidated opposition to the Union's motion to confirm and enforce and its reply to the Union's opposition to the motion to vacate (Consolidated Opposition and Reply), ZEI clarifies that it seeks to vacate the JAC award only in part. In its original motion to vacate, ZEI argued that the JAC exceeded its arbitration powers by finding that its employees were not exempt under PLA ¶ 2.7 and awarding the Union compensation for the wages of all three of its employees, instead of merely for the two Union workers it would have been required to hire had it complied with the PLA hiring and dispatch requirements. See Mot. to Vacate, at 9. However, in the Consolidated Opposition and Reply, ZEI concedes that "courts are not permitted to review the merits of these types of findings in labor arbitration awards" and states that it is only challenging as punitive the JAC's award of \$42,963.36 in fringe benefits contributions. Consolidated Opposition and Reply, at 1, 5.

ZEI's argument for vacating the \$42,963.36 award for trust fund contributions is that the award is punitive when considered in combination with the \$116,299.36 award; ZEI, however, changes its reasoning as to why a punitive award should be vacated. In its Motion to Vacate, ZEI argues that a punitive award does not "draw its essence" from the PLA, because punitive damages are not specifically authorized by the PLA. Mot. to Vacate, at 8-11. In the Consolidated Opposition and Reply, ZEI argues that punitive

1 damages in a labor arbitration award violate public policy.
2 Consolidated Opposition and Reply, at 4-12.

3 "In general, courts reviewing the decision of a labor
4 arbitrator are required to accord an arbitrator's decision a
5 'nearly unparalleled degree of deference.'" SSA Terminals v.
6 Machinists Auto. Trades Dist. Lodge No. 190, 244 F. Supp. 2d 1031,
7 1033 (N.D. Cal. 2003) (quoting Stead Motors of Walnut Creek v.
8 Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists &
9 Aerospace Workers, 886 F.2d 1200, 1205 (9th Cir. 1989)).² "When
10 reviewing the award of an arbitrator chosen by the parties to a
11 collective bargaining agreement, we are bound--under all except
12 the most limited circumstances--to defer to the decision of
13 another even if we believe that the decision finds the facts and
14 states the law erroneously." Stead Motors, 886 F.2d at 1204.

15 "The reason for this unusually high degree of deference is
16 that the arbitrator's decision is deemed to be part of the
17 parties' agreement." SSA Terminals, 244 F. Supp. 2d at 1033. As
18 the Ninth Circuit explained in Stead Motors,

19 Unlike the commercial contract, which is designed to be
20 a comprehensive distillation of the parties' bargain,
21 the collective bargaining agreement is a skeletal,
22 interstitial document. The labor arbitrator is the
23 person the parties designate to fill in the gaps; for
24 the vast array of circumstances they have not considered
25 or reduced to writing, the arbitrator will state the
26 parties' bargain. . . .

27 Since the labor arbitrator is designed to function in
28 essence as the parties' surrogate, he cannot
"misinterpret" a collective bargaining agreement.

² The Union asserts that review of the decision of the JAC is governed by the same standards as those for an arbitrator's award. See Opp. to Mot. to Vacate and Dismiss and Cross-Mot. for Summ. J. 7 n.8. ZEI does not dispute this.

1 . . . Thus, what courts do when they review an
2 arbitrator's award is more akin to the review of a
3 contract than of the decision of an inferior tribunal:
the award, just as a contract, is the expression of the
parties' will and must be enforced as expressed unless
illegal or otherwise void.

4 Stead Motors, 886 F.2d at 1205-06 (citations omitted).

5 The Ninth Circuit has "identified narrow exceptions to [the]
6 general rule" that labor arbitration awards are entitled to great
7 deference, and has held that "[v]acatur of an arbitration award
8 under section 301 of the LMRA is warranted: (1) when the award
9 does not draw its essence from the collective bargaining agreement
10 and the arbitrator is dispensing his own brand of industrial
11 justice; (2) where the arbitrator exceeds the boundaries of the
12 issues submitted to him; (3) when the award is contrary to public
13 policy; or (4) when the award is procured by fraud." S. Cal. Gas
14 Co. v. Util. Workers Union, Local 132, 265 F.3d 787, 792-793 (9th
15 Cir. 2001) (internal citations omitted). The Ninth Circuit has
16 clearly stated that both the "draw its essence" and the "public
17 policy" exceptions are extremely narrow. See Stead Motors, 886
18 F.2d at 1208 n.8 (stating that for both exceptions, "judicial
19 scrutiny of an arbitrator's decision is extremely limited").

20 Under the "draws its essence" exception,

21 [t]he arbitrator's factual determinations and legal
22 conclusions generally receive deferential review as long
23 as they derive their essence from the [collective
24 bargaining agreement]. If, on its face, the award
25 represents a plausible interpretation of the contract,
26 judicial inquiry ceases and the award must be enforced.
27 This remains so even if the basis for the arbitrator's
28 decision is ambiguous and notwithstanding the
erroneousness of any factual findings or legal
conclusions.

1 Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Arizona Mech. &
2 Stainless, Inc., 863 F.2d 647, 653 (9th Cir. 1988) (citations
3 omitted).

4 Similarly, to "vacate an arbitration award on public policy
5 grounds, a court must find: (1) that an 'explicit, well-defined
6 and dominant' public policy exists, and (2) 'that the policy is
7 one that specifically militates against the relief ordered by the
8 arbitrator.'" SSA Terminals, 244 F. Supp. 2d at 1035 (quoting
9 Stead Motors, 886 F.2d at 1212-1213). Such a public policy must
10 "be ascertained by reference to the laws and legal precedence and
11 not from general considerations of supposed public interests."
12 United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43
13 (1987) (internal quotation marks omitted).

14 Under either exception, ZEI's argument fails. First, the
15 award was compensatory in nature, not punitive, and drew its
16 essence from the PLA itself. ZEI argues that the JAC's award
17 constitutes "unjust enrichment of \$42,936.36," because it
18 "included two separate fringe contributions for the very same work
19 hours." Consolidated Opposition and Reply, at 1. ZEI arrives at
20 this result by reasoning that, because the \$116,299.36 award to
21 workers included fringe benefit contributions, a separate fringe
22 benefits award was redundant. See Mot. to Vacate, 10-11.
23 However, as the Union points out, the JAC considered this argument
24 and explicitly made each award to remedy different wrongs that
25 affected distinct groups of individuals. Maloon Decl. ¶ 17, Ex.
26 G, at 5-6.

27 The JAC awarded \$116,299.36 to "workers on the IBEW 595
28 Available for Work list" for hours that they should have been

1 working but were not because of ZEI's failure to abide by the
2 PLA's referral provisions. Id. The \$116,299.36 award included
3 wages and fringe benefit contributions for these "Available for
4 Work list" workers for these lost work hours. Id.; see also
5 Counter-compl. ¶ 20; Answer to Counter-compl. ¶ 20.

6 The JAC made the \$42,963.36 award "on behalf of employees of
7 Zoom Electric, Inc. to the IBEW, 595 Trust Funds" for the hours
8 that these ZEI employees did in fact work and for which they were
9 entitled to have a fringe benefits contribution made on their
10 behalf to the trust funds. Maloon Decl. ¶ 17, Ex. G, at 5-6.
11 This award remedied ZEI's failure to comply with the benefits
12 provisions for those workers it did actually employ. Id.

13 It is true that ZEI would have only had to make fringe
14 benefit contributions once, had it complied with the PLA. But
15 because its failure to do so implicated the benefits of two
16 separate sets of workers, the JAC determined that ZEI had to make
17 amends to both groups in order fully to remedy its improper
18 conduct. As the JAC aptly stated, "For the JAC to not acknowledge
19 that fact would be to contribute to the further victimization of
20 those workers." Maloon Decl. ¶ 17, Ex. G, at 6.

21 Thus, each of these awards was compensatory in nature and
22 drew its essence from the PLA. While ZEI argues that the JAC's
23 use of the word "penalize" means that the awards were punitive,
24 ZEI misstates the JAC's decision. The JAC did not use this word
25 when discussing the purportedly duplicative fringe benefit award,
26 as ZEI represents. Instead, the JAC used this word in addressing
27 ZEI's argument that ZEI should only be required to pay damages for
28 the two Union workers that it would have had to hire under the

1 dispatch ratio had it complied with the PLA. As previously
2 stated, ZEI does not dispute in its reply that it should have to
3 pay wages for all three workers. Further, there is no evidence
4 that the JAC's decision that ZEI should be required to pay the
5 wages of three workers, instead of two, was punitive instead of
6 compensatory. ZEI did not comply with the requirements of the PLA
7 that would have allowed it to request that the Union dispatch its
8 own workers, and its employees did not apply to the Union to be
9 dispatched; thus, had ZEI utilized Union labor as required under
10 the PLA, the Union would have dispatched three workers from its
11 list of Union members available for work.

12 Further, even if the JAC's award were punitive, ZEI has not
13 established that such an award should be vacated as contrary to
14 public policy. ZEI concedes that, in the Ninth Circuit, if a
15 collective bargaining agreement is sufficiently broad to include,
16 even arguably, the power to award punitive damages, a court must
17 defer to the arbitrator's self-interpreted authority to assess
18 such damages. Consolidated Opposition and Reply, at 12 (citing
19 Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers Int'l
20 Union, Local 104, 933 F.2d 759, 764 (9th Cir. 1991)). ZEI also
21 recognizes that the PLA broadly directs the JAC "to resolve the
22 grievance." PLA ¶ 12.2. ZEI, however, argues that the PLA
23 expressly limits the remedies available to "only 'normal contract
24 remedies' when recovering delinquent trust fund benefits."
25 Consolidated Opposition and Reply, at 10.

26 The PLA, however, contains no such restriction. ZEI cites to
27 Article X, which does not limit the remedies available to the
28 Union but instead expressly states that the PLA does not interfere

1 with the other remedies or rights that it may have. See PLA Art.
2 X ("Nothing in this agreement shall be construed to interfere with
3 or supersede the usual and customary legal remedies available to
4 the Unions and/or employee benefit Trust Funds to collect
5 delinquent Trust Fund contributions from Contractors on the
6 Project."). While it is true that the PLA refers to "normal
7 contract remedies," it does not do so to limit the remedies
8 available here, as ZEI purports. In section 3.7, the PLA states,
9 "It is agreed . . . with respect to contractors delinquent in
10 trust or benefit contribution payments, that nothing in this
11 Agreement shall affect normal contract remedies available under
12 the local collective bargaining agreements against general
13 contractors or upper-tier subcontractors signatory to those
14 agreements for recovery of subcontractor delinquencies." By its
15 terms, this section refers to the remedies available when bringing
16 actions against general contractors or higher-level subcontractors
17 for delinquencies of their subcontractors, and is inapplicable to
18 the claims against ZEI here. Further, it does not limit remedies
19 available in those situations to those expressly stated, but
20 instead provides that the PLA does not interfere those remedies.
21 ZEI's citation to section 3.4 of the PLA, which states, "No
22 practice, custom, understanding or agreement between a Contractor
23 and a Union party that is not specifically set forth in this
24 Agreement or in its appended Schedule A Agreements will be binding
25 on any other party unless agreed to in writing by the Parties," is
26 also unavailing. The Union does not seek to enforce any
27 extra-contractual agreement, but rather to enforce a JAC award
28 issued through the grievance process set forth in the PLA. Thus,

1 because the PLA broadly grants the JAC the power "to resolve the
2 grievance" without a limitation on the remedies that it may award,
3 this Court cannot hold that the broad grant of power to the JAC
4 did not "even arguably include the power to make an award of
5 punitive damages." Goss, 933 F.2d at 764.

6 ZEI has not demonstrated that this Court should depart from
7 the great deference normally accorded to labor arbitration awards.
8 Accordingly, the Court DENIES ZEI's motion to vacate the
9 arbitration award and GRANTS the Union's motion to confirm and
10 enforce the award against ZEI.

11 II. ZEI and Horak's motion to dismiss, and the Union's motion for
12 summary judgment on, the Union's second cause of action
against ZEI and Horak

13 The Union seeks summary judgment in its favor on the second
14 cause of action in its amended counter-complaint against ZEI for
15 failure to make fringe benefit contributions in January and
16 February 2011. The Union also seeks to hold Horak responsible as
17 the alter-ego of ZEI. ZEI and Horak do not dispute the Union's
18 factual allegations or supporting evidence; instead, they move to
19 dismiss the claim and argue that the Union failed to exhaust the
20 administrative remedies mandated by the arbitration clause as
21 required by the Employee Retirement Income Security Act of 1974
22 (ERISA), 29 U.S.C. § 1001, et seq., prior to bringing suit.

23 ZEI and Horak's arguments fail for several reasons. First,
24 as quoted above in Article X, the PLA expressly reserves to the
25 Union the right to bring statutory actions to recover delinquent
26 fringe benefit contributions and states that nothing in the PLA
27 shall interfere with its right to do so. See Trs. of the S. Cal.
28 Pipe Trades Health & Welfare Trust Fund v. Temecula Mech., Inc.,

1 438 F. Supp. 2d 1156, 1172-1173 (C.D. Cal. 2006) (finding that
2 exhaustion of administrative remedies was not required in an ERISA
3 trust fund contributions case when the collective bargaining
4 agreement contained a provision stating that the plaintiffs'
5 rights to bring a court action were not limited or restricted by
6 the procedures therein). In contrast, the cases upon which ZEI
7 and Horak rely involve agreements that were understood to require
8 arbitration. See Graphic Commc'ns Union, Dist. Council No. 2 v.
9 GCIU-Emp'r Ret. Ben. Plan, 917 F.2d 1184, 1186 (9th Cir. 1990)
10 ("The Union and the Plan agree that this provision is for
11 mandatory arbitration.") (emphasis in original).

12 Further, the Union here seeks recovery on behalf of the trust
13 funds, and seeks to add the trust funds as Counter-Plaintiffs,
14 which is unopposed by ZEI and Horak. Courts have recognized that,
15 "in the absence of an unambiguous expression by the parties to the
16 contrary, pension funds are not required to exhaust collective
17 bargaining agreement arbitration procedures prior to filing an
18 action for collection of delinquent contributions to the pension
19 fund." Flynn v. Dick Corp., 481 F.3d 824, 833 (D.C. Cir. 2007)
20 (quoting Flynn v. Interior Finishes, Inc., 425 F. Supp. 2d 38, 48
21 n.11 (D.D.C. 2006)). See Carpenters Health & Welfare Trust Fund
22 v. Bla-Delco Constr., 8 F.3d 1365, 1369 (9th Cir. 1993) (trust
23 fund not required to arbitrate prior to bringing action to collect
24 contributions where this was not expressly mandated by any
25 agreement to which the fund was a party); see also Schneider
26 Moving & Storage Co. v. Robbins, 466 U.S. 364, 372 (1984) (holding
27 that "the presumption of arbitrability is not a proper rule of
28 construction in determining whether arbitration agreements between

1 the union and the employer apply to disputes between trustees and
2 employers, even if those disputes raise questions of
3 interpretation under the collective-bargaining agreements").

4 Finally, to argue that exhaustion is required here, ZEI and
5 Horak rely heavily on cases that address an exhaustion requirement
6 in the context of plan participants or beneficiaries bringing
7 claims for benefits under the terms of an ERISA plan, rather than
8 on cases that address a Union or a trust fund seeking delinquent
9 contributions pursuant to 29 U.S.C. §§ 1132 and 1145. See, e.g.,
10 Chappel v. Laboratory Corp. of Am., 232 F.3d 719 (9th Cir. 2000);
11 Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50
12 F.3d 1478 (9th Cir. 1995); Amato v. Bernard, 618 F.2d 559 (9th
13 Cir. 1980). See also Graphic, 917 F.2d at 1187 (summarizing the
14 holding of Amato, the first case in the Ninth Circuit addressing
15 exhaustion in the ERISA context, as "federal courts should usually
16 require that parties seeking a review of a decision by an employee
17 benefit plan's administrator first seek review of that decision
18 from the plan's trustees").

19 ZEI and Horak present no authority to support that this
20 court-created doctrine has been applied in actions for delinquent
21 trust fund contributions, and do not argue that the same reasoning
22 that motivated courts to create the requirement are present here.
23 In Amato, which involved an ERISA claim for benefits under a union
24 pension plan, the Ninth Circuit predicated its holding that
25 exhaustion generally should be required in such cases on specific
26 findings, including that Congress had included in ERISA a
27 requirement that plans must "provide administrative remedies for
28 persons whose claims for benefits have been denied" and authorized

1 the Secretary of Labor to promulgate regulations governing such
2 procedures. Amato, 618 F.2d at 567. Congress, however, did not
3 include in ERISA a requirement that plans establish such
4 administrative remedies for the collection of delinquent trust
5 fund contributions; instead, Congress enacted 29 U.S.C. § 1145,
6 which "created a cause of action under ERISA for proceeding
7 against an employer who is delinquent in making contributions to a
8 plan." Local 159 v. Nor-Cal Plumbing, Inc., 185 F.3d 978, 983
9 (9th Cir. 1999). See also Trs. of the Screen Actors Guild--
10 Producers Pension & Health Plans v. NYCA, Inc., 572 F.3d 771, 776
11 (9th Cir. 2009)).

12 Further, in Amato, the Ninth Circuit recognized that Congress
13 enacted the statutory requirement that plans provide
14 administrative remedies for benefit claims for a variety of
15 reasons, including "to promote the consistent treatment of claims
16 for benefits; to provide a nonadversarial method of claims
17 settlement; and to minimize the costs of claims settlement for all
18 concerned." Amato, 618 F.2d at 567. The Ninth Circuit also
19 acknowledged that ERISA granted the trustees broad fiduciary
20 rights and responsibilities to the plans and that requiring
21 exhaustion of administrative remedies both allowed the trustees to
22 undertake their duties without premature judicial interference in
23 their decision-making process and allowed the courts to benefit
24 from the trustees' prior consideration and evaluation of the
25 claim. Id. at 567-68. ZEI and Horak make no showing that such
26 concerns are present in actions which are not claims for benefits
27 and in which the trustees are plaintiffs seeking to enforce
28 statutory obligations of employers.

1 Accordingly, the Court finds that the Union was not required
2 to exhaust administrative remedies prior to bringing its second
3 cause of action. The Court DENIES ZEI and Horak's motion to
4 dismiss this claim and GRANTS the Union's motion for summary
5 judgment in its favor on this claim against ZEI. Horak's
6 liability as the alter-ego for ZEI is addressed below in Section
7 Three.

8 III. Horak and sole proprietorship Zoom Electric's motion to
9 dismiss the Union's counter-claims and the Union's motions to
10 enforce the award against Horak and for summary judgment on
its second cause of action against Horak

11 Horak and Zoom Electric, as a sole proprietorship, seek to
12 dismiss the Union's counter-claims against them on the bases that
13 they were not signatories to the PLA or parties to the JAC award
14 and that the counter-complaint does not allege sufficient facts to
15 support a finding that Horak was the alter ego of ZEI or Zoom
16 Electric. The Union in turn seeks to enforce the arbitration
17 award against Horak, and summary judgment against Horak on its
18 second cause of action, by piercing the corporate veil and holding
19 Horak accountable for actions that he took on behalf of Zoom
Electric, Inc. while its corporate status was suspended.

20 As the sole owner of Zoom Electric, Horak "is personally
21 liable for all debts and responsibilities incurred by the
22 business." Paradise Northwest, Inc. v. Randhawa, 2012 U.S. Dist.
23 LEXIS 6210, at *9 (E.D. Cal.) (citing Century Sur. Co. v. Polisso,
24 139 Cal. App. 4th 922, 943 (2006)). See also York Group, Inc. v.
25 Wuxi Taihu Tractor Co., 632 F.3d 399, 403 (7th Cir. 2011) ("A
26 proprietorship is just a name that a real person uses when doing
27 business; it is not a juridical entity. . . . The only entity is
28

1 the proprietor . . . [The names of the proprietorship and the
2 proprietor] are two names for the same person."); Asdourian v.
3 Araj, 38 Cal. 3d 276, 284-85 (1985), superseded by statute on
4 other grounds as stated in Pac. Custom Pools, Inc. v. Turner
5 Constr. Co., 79 Cal. App. 4th 1254, 1261 (2000) (in essence, a
6 sole proprietorship is the individual).

7 The Union has also presented sufficient evidence to pierce
8 the corporate veil of Zoom Electric, Inc. and hold Horak liable
9 for its debts as well. "In considering whether to disregard the
10 corporate form, we apply federal substantive law, although we may
11 look to state law for guidance." Board of Trustees v. Valley
12 Cabinet & Mfg. Co., 877 F.2d 769, 772 (9th Cir. 1989) (citing
13 Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up
14 Serv., 736 F.2d 516, 523 (9th Cir. 1984)). "The determination of
15 whether or not to pierce the corporate veil and hold a shareholder
16 personally liable for corporate debts is based on three factors:
17 'the amount of respect given to the separate identity of the
18 corporation by its shareholders, the degree of injustice visited
19 on the litigants by recognition of the corporate entity, and the
20 fraudulent intent of the incorporators.'" Id. (quoting Seymour v.
21 Hull & Moreland Eng'g, 605 F.2d 1105, 1111 (9th Cir. 1979)). A
22 party seeking to pierce the corporate veil "must prevail on the
23 first threshold factor and on one of the other two." UA Local 343
24 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1475 (9th Cir. 1995). In
25 addition to the formation of a corporation with fraudulent intent,
26 "post incorporation misuse of the corporate form . . . can satisfy
27 the fraudulent intent element." Valley Cabinet, 877 F.2d at 774.
28

1 The Union has presented substantial evidence, and Horak does
2 not dispute, that Horak has failed to respect Zoom Electric,
3 Inc.'s corporate form. First, Horak conducted a significant
4 amount of business in the name of Zoom Electric, Inc. while its
5 corporate status was suspended, including assenting to the PLA,
6 contracting to perform the work at Roosevelt Middle School and
7 participating in the JAC dispute resolution process. Further,
8 while suspension of corporate status under section 23301 of the
9 California Revenue and Tax Code does not automatically "deprive
10 the corporation's shareholders of the normal protection of limited
11 liability," a "corporation's failure to pay its franchise tax,"
12 which is the reason for suspension, is one piece of evidence "that
13 the shareholders do not view the corporation as having a separate
14 existence and that the corporation should possibly be regarded as
15 the alter ego of its shareholders." United States v. Standard
16 Beauty Supply Stores, Inc., 561 F.2d 774, 776-777 (9th Cir. 1977).
17 Finally, instead of obtaining a contractor license for Zoom
18 Electric, Inc., as required by California law prior to Zoom
19 Electric, Inc. acting as a contractor, see Cal. Bus. & Prof. Code
20 §§ 7025, 7028, Horak used his own contractor license number as
21 that of Zoom Electric, Inc., which is prohibited by law, Cal. Bus.
22 & Prof. Code § 7027.3. See also Opp v. St. Paul Fire & Marine
23 Ins. Co., 154 Cal. App. 4th 71, 76-80 (2007) (a corporation may
24 not claim "substantial compliance" with the licensing requirement
25 if it has never been licensed within the state of California, even
26 if its managing officer and sole owner was duly licensed
27 throughout the relevant time period).

1 As previously stated, in addition to showing that Horak
2 failed to respect Zoom Electric, Inc.'s corporate form, the Union
3 must also show either that recognition of the corporate form would
4 result in an injustice or that Horak formed the corporation with
5 fraudulent intent or engaged in post-incorporation misuse of the
6 corporate form. Instead of proving just one of these additional
7 requirements, the Union has satisfied its burden as to both.

8 Horak does not raise any disputed material facts in response
9 to the evidence presented by the Union to support the fraudulent
10 intent prong. The Union has introduced evidence that Horak has
11 continually misrepresented the corporate status of Zoom Electric,
12 Inc. in a variety of settings, including in the letter of assent
13 to the PLA, in the contract with B-side, and to the JAC and other
14 participants in the arbitration process. Under California law,
15 Horak may be held criminally liable for transacting business on
16 behalf of Zoom Electric, Inc. while its corporate status was
17 suspended. See Cal. Rev. & Tax Code § 19719(a) (creating a
18 criminal offense for "attempt[ing] or purport[ing] to exercise the
19 powers, rights, and privileges of a corporation that has been
20 suspended pursuant to Section 23301"). Further, the fact that
21 Horak misrepresented and failed to correct mistakes about Zoom
22 Electric, Inc.'s corporate and license status during the JAC
23 process suggests that he did so in order not to be individually
24 named in the JAC award.

25 "Courts have found [the injustice] prong satisfied when 'a
26 corporation is so undercapitalized that it is unable to meet debts
27 that may reasonably be expected to arise in the normal course of
28 business.'" Laborers Clean-Up Contract Admin. Trust Fund v.

1 Uriarte Clean-Up Service, Inc., 736 F.2d 516, 525 (9th Cir. 1984)
2 (citing Note, Piercing the Corporate Law Veil: The Alter Ego
3 Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 855
4 (1982)). The fact that Zoom Electric, Inc. failed to pay its
5 franchise tax, resulting in suspension of its corporate status, is
6 evidence that it was undercapitalized. Horak has also admitted
7 that Zoom Electric, Inc. lacked the funds to make fringe benefits
8 contributions for workers whom it employed at least in March 2011.
9 Horak Depo. 79, 84. Zoom Electric, Inc. willfully contributed to
10 its own undercapitalization by undertaking work without a valid
11 contractor license: it may not bring a suit for payment on jobs
12 that it undertook while unlicensed and any person who has already
13 paid Zoom Electric, Inc. for such work may bring an action to
14 recover that compensation. See Cal. Bus. & Prof. Code
15 § 7031(a),(b).

16 Accordingly, the Court GRANTS the Union's motions to confirm
17 and enforce the arbitration award against Horak and for summary
18 judgment in its favor on its second cause of action against Horak,
19 and DENIES Horak and Zoom Electric's motion to dismiss that cause
20 of action.

21 IV. The Union's motion for leave to file a second amended
22 counter-complaint

23 The Union seeks leave to add B-Side, Inc. as a
24 Counter-Defendant in order to hold it liable as the general
25 contractor to subcontractor ZEI pursuant to California Labor Code
26 section 2750.5. The Union also seeks to add as Counter-Plaintiffs
27 the trust funds, EISC, Uno and Campbell. ZEI opposes the Union's
28 motion to join B-Side and does not oppose joinder of the

1 additional Counter-Plaintiffs. Opp. to Mot. for Leave, Docket No.
2 65.

3 ZEI argues that joinder of B-side should not be permitted,
4 because the Union has delayed in seeking leave, resulting in
5 prejudice against ZEI, because joinder of B-side is futile as a
6 matter of law, and because the Union acted in bad faith.

7 Federal Rule of Civil Procedure 15(a) provides that leave of
8 the court allowing a party to amend its pleading "shall be freely
9 given when justice so requires." Because "Rule 15 favors a
10 liberal policy towards amendment, the nonmoving party bears the
11 burden of demonstrating why leave to amend should not be granted."
12 Genentech, Inc. v. Abbott Laboratories, 127 F.R.D. 529, 530-531
13 (N.D. Cal. 1989) (citing Senza-Gel Corp. v. Seiffhart, 803 F.2d
14 661, 666 (Fed. Cir. 1986)). Courts generally consider five
15 factors when assessing the propriety of a motion for leave to
16 amend: undue delay, bad faith, futility of amendment, prejudice to
17 the opposing party and whether the party has previously amended
18 the pleadings. Ahlmeier v. Nev. Sys. of Higher Educ., 555 F.3d
19 1051, 1055 n.3 (9th Cir. 2009).

20 Although these five factors are generally all considered,
21 "futility of amendment alone can justify the denial of a motion."
22 Id. at 1055. "[A] proposed amendment is futile only if no set of
23 facts can be proved under the amendment to the pleadings that
24 would constitute a valid and sufficient claim or defense." Miller
25 v. Rykoff-Sexton, 845 F.2d 209, 214 (9th Cir. 1988); Bonin v.
26 Calderon, 59 F.3d 815, 845 (9th Cir. 1995). In contrast, delay is
27 "not alone enough to support denial." Morongo Band of Mission
28 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

1 ZEI argues that the Union has unduly delayed in seeking to
2 add B-side, because it has known since before filing the lawsuit
3 that ZEI was unlicensed and was a subcontractor of B-side. The
4 Union responds only that it could not "conclusively show that ZEI
5 had no contractor license of its own" until Horak was deposed on
6 November 18, 2011. Reply, at 7. However, despite the Union's
7 arguments, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007),
8 and Ashcroft v. Iqbal, 556 U.S. 662 (2009), do not require it to
9 be able "conclusively" to prove its case in order to satisfy the
10 pleading requirements. The Union admits that it believed that ZEI
11 was unlicensed before the commencement of the case and that it has
12 had evidence since at least July 11, 2011 from the Contractors
13 License Board, showing that ZEI was unlicensed. Reply, at 7. See
14 1RJN, Docket No. 27, Exs. A-C. Accordingly, the Court finds that
15 the Union delayed for at least five to seven months in seeking
16 leave to amend.

17 ZEI also argues that the Union is acting in bad faith by
18 seeking to add B-side to this case only after the Union's
19 stop-notice case against B-side was dismissed in state court. The
20 Union responds that it could institute a new and separate action
21 against B-side bringing the same claims as in the instant case.
22 ZEI presents no evidence or argument that the stop-notice case
23 would bar the Union from doing so or how that case, a very
24 different type of action, could have determined issues related to
25 B-side's liability for the arbitration award under section 2750.5.
26 Accordingly, the Court finds that ZEI has not established that the
27 Union is acting in bad faith.
28

1 ZEI further argues that amendment would be futile, because
2 the LMRA pre-empts section 2750.5, on which the Union relies to
3 argue that B-side as general contractor is the employer of its
4 unlicensed subcontractor and those employed by its unlicensed
5 subcontractor. See Hunt Bldg. Corp. v. Bernick, 79 Cal. App. 4th
6 213, 220 (2000) ("Labor Code section 2750.5 operates to
7 conclusively determine that a general contractor is the employer
8 of not only its unlicensed subcontractors but also those employed
9 by the unlicensed subcontractors.") (collecting cases). ZEI
10 argues that the LMRA "completely preempts" state law claims
11 brought to enforce collective bargaining agreements, such that
12 "any claim purportedly based on that preempted state law is
13 considered, from its inception, a federal claim, and therefore
14 arises under federal law." Balcorta v. Twentieth Century-Fox Film
15 Corp., 208 F.3d 1102, 1107 (9th Cir. 2000). ZEI reasons that the
16 Union thus may not rely on the California Labor Code for liability
17 against B-side. ZEI does not cite any case in which a court has
18 found that the LMRA preempts section 2750.5.

19 The LMRA's broad preemption is not without limits. The
20 Supreme Court has stated that the LMRA "cannot be read broadly to
21 pre-empt nonnegotiable rights conferred on individual employees as
22 a matter of state law." Livadas v. Bradshaw, 512 U.S. 107, 123
23 (1994). Further, "the Supreme Court has distinguished between
24 claims that require interpretation or construction of a labor
25 agreement and those that require a court simply to 'look at' the
26 agreement." Balcorta, 208 F.3d at 1108 (citing Livadas, 512 U.S.
27 at 123-26); see also Livadas, 512 U.S. at 124 ("when the meaning
28 of contract terms is not the subject of dispute, the bare fact

1 that a collective-bargaining agreement will be consulted in the
2 course of state-law litigation plainly does not require the claim
3 to be extinguished").

4 The Union argues that section 2750.5 confers a non-negotiable
5 right intended to protect all workers from unlicensed contractors.
6 ZEI appears to counter that this right is limited only to
7 "worker's compensation coverage" for "those injured on a job,"
8 because it is located within the workers' compensation statute.
9 Opp. to Mot. for Leave, at 7. However, it is not located within
10 Divisions 4 through 4.7 of the California Labor Code, which
11 address Workers' Compensation, but instead is located within
12 Division Three, which addresses Employment Relations. California
13 state courts have explicitly recognized that section 2750.5 is not
14 limited to workers' compensation cases. See Foss v. Anthony
15 Industries, 139 Cal. App. 3d 794, 798 (1983) ("To uphold the
16 superior court's finding section 2750.5 applies only in workers'
17 compensation cases, we would have to assume the Legislature did
18 not realize the scope of the division in which it placed the new
19 section, an assumption we cannot make."); Sanders Construction
20 Co., Inc. v. Cerda, 175 Cal. App. 4th 430, 436 (2009) ("Although
21 we agree that one reason for section 2750.5 is to insure
22 compensation for injured workers, we also recognize it is
23 fundamental that workers be paid. We discern no meaningful
24 distinction exists between being paid wages and receiving other
25 benefits based on wages. In both instances, the same policy
26 reasons militate against allowing a general contractor to escape
27 liability for the obligations of an unlicensed subcontractor.").

1 Further, application of section 2750.5 in this case would not
2 require any interpretation of the PLA, because once ZEI's
3 liability is established, as it has been, the PLA does not need to
4 be consulted to determine B-side's liability as general contractor
5 under section 2750.5.

6 ZEI also suggests that B-side may not be held liable because
7 ZEI told B-side that it was licensed, and because B-side did not
8 have an opportunity to defend itself during the JAC proceeding, so
9 the JAC award cannot be enforced against it. These are defenses
10 that can be raised and argued by B-side itself. These matters do
11 not amount to prejudice to ZEI.

12 The Court finds that ZEI has not demonstrated that the Union
13 has not stated a plausible claim to relief under which B-side may
14 be held liable for the award against ZEI under section 2750.5.

15 Finally, ZEI argues that it would be unduly prejudiced by
16 B-side's joinder because it would increase litigation costs.
17 However, with this Order, the Court resolves all claims against
18 ZEI, and only the liability of B-side remains to be adjudicated.
19 Even if additional discovery were required from ZEI, it would be
20 very limited, and would only go to whether ZEI was the
21 sub-contractor of B-side for the relevant jobs and whether ZEI was
22 licensed during the relevant time period. Consequently, ZEI has
23 not demonstrated that amendment would prejudice it.

24 Accordingly, the Court GRANTS the Union's motion for leave to
25 file a second amended counter-complaint. The Union shall file the
26 second amended counter-complaint forthwith and serve it as soon as
27 possible.
28

CONCLUSION

For the reasons set forth above, the Court DENIES Horak and Zoom Electric's motion to dismiss (Docket No. 17), DENIES ZEI's motion to vacate the arbitration award (Docket No. 20), DENIES Horak and ZEI's motion to dismiss the Union's first amended counter-complaint (Docket No. 60), GRANTS the Union's motion for leave to file a second amended counter-complaint (Docket No. 62), and GRANTS the Union's motion to confirm the arbitration award and for summary adjudication on its second cause of action (Docket No. 69).

Within seven days of the date of this Order, Counter-Plaintiffs shall file a verified calculation of the damages that they request based on their second cause of action. Specifically, Counter-Plaintiffs shall include a calculation of the contributions ZEI failed to make for forty-eight hours of labor in January 2011 and sixty-four hours in February, plus liquidated damages equal to ten percent (10%) of delinquent contributions and interest at the rate of twelve percent (12%) simple interest per annum, and shall show how they calculated the total requested damages.

The case management conference currently set for March 29, 2012 at 2:00 p.m. is CONTINUED to May 9, 2012 at 2:00 p.m.

IT IS SO ORDERED.

Dated: 3/20/2012


CLAUDIA WILKEN
United States District Judge